Supreme Court, U.S.
FILED
JUL 11 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1997

In the Supreme Court of the United States

OCTOBER TERM, 1986

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONER

v.

HARVSTONE MANUFACTURING CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board
Washington, D.C. 20570

TABLE OF AUTHORITIES

Page

Cases:

ACL Corp., d/b/a Atlantic Hilton & Tower, 271 N.L.R.B. 1600 5-6

Charles D. Bonanno Linen Services v. *NLRB*, 454 U.S. 404 6

Meilman Food Industries, Inc., 234 N.L.R.B. 698, enforced, 593 F.2d 1371 7

New York Printing Pressmen & Offset Workers Union No. 51 v. *NLRB*, 538 F.2d 496 6

NLRB v. *Carilli*, 648 F.2d 1206 4

NLRB v. *Katz*, 369 U.S. 736 4

NLRB v. *Truck Drivers Local Union No. 449*, 353 U.S. 87 6

NLRB v. *Truitt Mfg. Co.*, 351 U.S. 149 ..... 3, 6

NLRB v. *Unoco Apparel, Inc.*, 508 F.2d 1368 6

United Fire Proof Warehouse Co. v. *NLRB*, 356 F.2d 494 6

Universal Camera Corp. v. *NLRB*, 340 U.S. 474 6

Statutes:

National Labor Relations Act, 29 U.S.C. (& Supp. II) 151 *et seq.*:

§ 8(a)(1), 29 U.S.C. 158(a)(1) 1, 3
§ 8(a)(5), 29 U.S.C. 158(a)(5) 1, 3, 4

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1997

LOCAL 134, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, PETITIONER

v.

HARVSTONE MANUFACTURING CORP., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

Petitioner seeks review of the court of appeals' decision denying enforcement of a National Labor Relations Board decision that the respondent employers violated Section 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. 158(a)(5) and (1), by refusing petitioner's request to inspect their financial records and by unilaterally instituting changes in terms of employment.

1. Respondents, manufacturers of fluorescent lighting equipment in the Midwest, were parties to contracts with petitioner, Local 134, International Brotherhood of Electrical Workers. The contracts were substantially similar and all were due to expire on August 31, 1982. In the months preceding that expiration date, the parties held bargaining sessions at which one attorney represented all respondents. Although the attorney conducted separate negotiating

sessions for each employer, the parties treated the discussions at each session as relating to all of the employers. Pet. App. 3a-4a, 40a; Tr. 26-27, 178, 192.[1]

During those negotiations the employers sought concessions in wages, regularly scheduled cost-of-living adjustments, and other benefits. In support of these proposals they cited data purporting to show that their labor costs were higher than those of competitors in other regions. Petitioner opposed the concessions and proposed instead that wages and benefits be increased. SX 6; Tr. 75-78, 109, 112-113, 135, 137-138, 192-193, 216.

The employers' representative stated at various times that the employers had made a "business judgment" that reduced labor costs were required to enable the firms to remain competitive in the industry; that " 'relief on labor costs' was essential"; that the employers needed relief "to 'stay in business [or] no one will have jobs' "; and that the employers " 'could, but . . . . not necessarily . . . . would * * * * go out of business' " without concessions (Pet. App. 48a-49a (citations omitted)). When petitioner asked, " 'Are you saying that if we don't give you the reductions in labor costs * * * [the employers] will go out of business?,' " the employers' representative replied that " '[t]hey might or they might not,' " *id.* at 49a; Tr. 101, 266-267. In response, petitioner demanded to examine the employers' financial records. The employers refused, stating that they were "not pleading poverty." SX 6; Pet. App. 47a-48a.

In the absence of a new agreement, the old contracts expired on August 31, 1982. The expired contracts had provided for a cost-of-living adjustment (COLA) to take

---

[1] "Tr." refers to the transcript of the hearing before the administrative law judge. "SX," "JX," and "GCX" refer, respectively, to the stipulated exhibits, joint exhibits, and General Counsel's exhibits introduced at that hearing.

effect each September 1, based on a calculation from the consumer price index of the preceding July. Following expiration of the contracts, and consistent with their proposals on the issue during negotiations, the employers declined to pay a COLA on September 1, 1982. The employers also implemented their final contract offers on several other issues, eliminating a paid "wash-up" period, established vacation schedules, and certain insurance benefits. Pet. App. 17a, 40a-41a; JX 1, GCX 1(m), (q).

2. The Board, affirming the administrative law judge, found that the employers violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to allow petitioner to inspect their financial records (Pet. App. 28a-29a, 47a-50a). The Board concluded that the employers had asserted an inability to afford petitioner's bargaining demands and were therefore required to make records available to permit verification of their claimed inability to pay (see *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. 149, 152-153 (1956)).

The Board also agreed with the administrative law judge that the employers' refusal to permit inspection of their financial records precluded the parties from reaching a bona fide impasse in negotiations, and that in the absence of such an impasse the employers violated Section 8(a)(5) and (1) of the Act by unilaterally eliminating the COLA and changing other terms of employment (Pet. App. 50a).[2] The

---

[2]The administrative law judge also found that the employers had a binding obligation to pay the September 1982 COLA under the terms of the expired contract; thus, respondents' proposals during negotiations to eliminate that COLA constituted "insistence upon bargaining concerning a 'nonmandatory' subject on which [petitioner] was not obligated to bargain" that also precluded a bona fide impasse (Pet. App. 40a-46a). The Board, however, did not reach the question whether payment of the September 1982 COLA was a previously bargained obligation under the terms of the old contract; rather, it relied solely upon the employers' refusal to allow inspection of financial records in

Board's order required the employers, inter alia, to make their financial records available to petitioner, to reinstate the terms of employment that had been unilaterally changed, and to make employees whole for losses caused by those unilateral changes (Pet. App. 29a, 53a-69a).

3. The court of appeals modified and enforced the Board's order as to one of the employers (Duray Fluorescent Manufacturing Co.) and denied enforcement as to the other three employers (Pet. App. 1a-26a).

The court acknowledged that an employer that claims to be unable to meet proposed economic terms has an obligation to accede to a union's request for verifying financial data. The court stated, however, that "the mere assertion by an employer that it is operating at a competitive disadvantage does not, in and of itself, constitute a claim of inability to pay." Pet. App. 7a. Rather, the court added, "[t]he relevant test * * * is to ascertain whether the employer said it 'would not' as opposed to 'could not' pay the employees' proposed demands" (*id.* at 7a-8a (footnote omitted)).

Noting that Duray conceded that its answer to the unfair labor practice complaint had asserted an inability to pay, the court concluded that "[o]n this basis alone * * * there is

---

finding that a valid impasse had not been reached (*id.* at 28a n.1). Thus, in the Board's view, wholly apart from the question whether the employers had a contractual obligation to pay the September 1982 COLA, the employers were obliged under Section 8(a)(5) of the Act to refrain from unilaterally changing existing terms and conditions of employment (including the practice of making COLA payments in September), as defined by the expired agreements, until the parties reached either a new agreement or a legitimate impasse. See *NLRB* v. *Katz*, 369 U.S. 736, 741-748 (1962); *NLRB* v. *Carilli*, 648 F.2d 1206, 1214 (9th Cir. 1981).

Finally, contrary to the administrative law judge, the Board found that the employers' unilateral changes in certain Christmas bonuses, prizes, and parties did not violate the Act because those items were gifts rather than terms and conditions of employment (Pet. App. 28a n.1, 40a, 45a-46a, 50a).

substantial evidence to support the Board's finding" as to Duray (Pet. App. 9a-10a). As to the other employers, however, the court concluded that "they never implied that they were financially unable, as opposed to unwilling, to meet the Union's demands," but rather had merely demanded concessions in order to be competitive (*id.* at 10a).[3]

The court also rejected petitioner's contention that the record could not support a finding of impasse because: (1) the terms of the expired contracts required payment of the September 1982 COLA and (2) the employers were thus not entitled to insist upon eliminating that payment during negotiations. The court found that the expired contracts "provided that cost-of-living adjustments would be effective on each March 1 and September 1 during the life of the agreements" (Pet. App. 17a), and "[s]ince the September 1, 1982, effective date occurred after the expiration of the collective bargaining agreements, the [employers] were not obligated to pay the adjustment in question" (*id.* at 19a). Accordingly, the court concluded that the employers "did not violate the Act or their agreements by bargaining to an impasse over the cost-of-living adjustment" (*ibid.*).

4. Petitioner does not dispute the established principle that "simple unwillingness to meet the employees' demands, rather than inability to do so" does not trigger an employer's obligation to provide financial data to the employees' bargaining representative. *ACL Corp. d/b/a*

---

[3]In rejecting the Board's contrary conclusion, the court stated (Pet. App. 10a): "[T]he ALJ knitted together a smattering of words and phrases, and from this compilation derived his finding that the [employers] pleaded inability to pay. A review of the record as a whole leads us to conclude, however, that the ALJ took much of the testimony out of context and that in the proper perspective the three [employers], in seeking concessions, had not claimed inability to pay."

Judge Swygert dissented from the denial of enforcement as to the three employers (Pet. App. 21a-26a).

Atlanta Hilton & Tower, 271 N.L.R.B. 1600, 1602 (1984). Accord *New York Printing Pressmen & Offset Workers Union No. 51* v. *NLRB*, 538 F.2d 496, 500 (2d Cir. 1976); *NLRB* v. *Unoco Apparel, Inc.*, 508 F.2d 1368, 1370 (5th Cir. 1975); *United Fire Proof Warehouse Co.* v. *NLRB*, 356 F.2d 494, 498 (7th Cir. 1966). See also *NLRB* v. *Truitt Mfg. Co.*, 351 U.S. at 152-153. Rather, petitioner contends (Pet. 18-19) that the court of appeals erred in rejecting the Board's finding that all of the respondent employers asserted an inability to meet petitioner's bargaining demands and were thus required to grant access to their financial records. While the Board believes that the court should have upheld that finding, the Board has not filed its own petition for a writ of certiorari because in its judgment the difference between the Board and the court presents essentially a factual issue that does not warrant review by this Court.[4] See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951).

Similarly, petitioner's challenge (Pet. 13-18) to the court's finding that the expired contracts did not require the employers to pay the September 1982 COLA raises a

---

[4]Petitioner contends (Pet. 18-19) that the admission of an inability-to-pay claim in employer Duray's answer was binding on the other three employers. In support of that contention petitioner relies on this Court's decisions in *Charles D. Bonanno Linen Service* v. *NLRB*, 454 U.S. 404 (1982), and *NLRB* v. *Truck Drivers Local Union No. 449*, 353 U.S. 87 (1957). Those decisions do not conflict with the decision below. *Bonanno* held that a bargaining impasse does not itself justify an employer's withdrawal from a multiemployer bargaining unit, and *Truck Drivers* held that members of a multiemployer association may engage in a lockout as a defense to a strike against one member. Those decisions deal with the permissible scope of economic action by employers engaged in multiemployer bargaining; they do not hold that a single employer's answer binds other employers where in the court's view the evidence shows that the other employers had never made such a claim.

factbound issue respecting interpretation of the particular contract involved here.[5]

Respectfully submitted.

CHARLES FRIED
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

JULY 1986

---

[5]Contrary to petitioner's contention (Pet. 13-18), there is no conflict between the court's interpretation of the contract here and the decision in *Meilman Food Industries, Inc.*, 234 N.L.R.B. 698 (1978), enforced, 593 F.2d 1371 (D.C. Cir. 1979) (Table). In *Meilman*, the Board held that a cost-of-living adjustment had accrued under a contract even though its effective date fell after the expiration of the contract. As the court below explained (Pet. App. 18a-19a), however, the Board relied on clear contractual language providing that the obligation to pay the adjustment accrued as of the date it was calculated, rather than on the date it became effective. See *Meilman*, 234 N.L.R.B. at 698, 704. Here, by contrast, although the July 1 calculation date is mentioned in the contracts, there was "no language in the agreements establishing the review dates as the time at which the cost-of-living adjustments became contractually enforceable rights in the hands of the employees," and the "contractual duty to pay such adjustments arose * * * only on the effective dates during the life of the agreements" (Pet. App. 18a-19a).